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April 15, 2011

Cynthia T. Brown
Chief of the Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20423

Re: Docket No. NOR-42129; American Chemistry Council; The Chlorine Institute, Inc., The Fertilizer Institute, and PPG Industries, Inc. v. Alabama Gulf Coast Railway, and RailAmerica., Inc.

Dear Ms. Brown:

Enclosed for filing please find the original and ten (10) copies of Complainants Motion for Injunctive Relief to be filed in the above-captioned proceeding together with the Verified Statement of Frank Reiner in support of the Motion.

Sincerely,

Paul M. Donovan
Counsel for Complainants

ORIGINAL

EXPEDITED CONSIDERATION REQUESTED

BEFORE THE
SURFACE TRANSPORTATION BOARD

American Chemistry Council, The Chlorine Institute, Inc., The Fertilizer Institute, and PPG Industries, Inc., Complainants, v. Alabama Gulf Coast Railway, and RailAmerica, Inc. Defendants.	)	Docket No. NOR-42129

MOTION FOR INJUNCTIVE RELIEF UNDER 49 U.S.C. § 721 (b) (4)

COME NOW Complainants, American Chemistry Council ("ACC"), 700 Second St., NE, Washington, DC 20002; the Chlorine Institute, Inc.("CI"), 1300 Wilson Blvd., Suite 525, Arlington, VA 22209; The Fertilizer Institute ("TFI"), 425 Third Street, S.W., Suite 950, Washington, DC 20024; and PPG Industries, Inc. ("PPG"), One PPG Place, Pittsburgh, PA 15272 and file this Motion for Injunctive Relief ("Motion") against Defendants Alabama Gulf Coast Railway ("AGR"), 734 Hixon Road, Monroeville, AL 36460; and RailAmerica, Inc. ("RailAmerica"), 7411 Fullerton Street, Suite 300, Jacksonville, FL 32256. Complainants file this Motion under 49 U.S.C. § 721 (b) (4) and 49 C.F.R. 1117. Complainants, in the Complaint filed in this proceeding, have requested that the Surface Transportation Board ("STB" or "Board") determine that the TIH/PIH

Standard Operating Practice ("SOP") that is being and has been adopted and implemented by Defendant RailAmerica and various of its railroad operating subsidiaries, including Defendant AGR, is an unreasonable practice in violation of 49 U.S.C. § 10702, and determine that the RailAmerica SOP is contrary to the common carrier obligations of its various operating subsidiaries, including AGR, in violation of 49 U.S.C. § 11101; and that the Board enjoin the implementation of the SOP pursuant to 49 U.S.C. § 721 (b)(4) pending final resolution of this Complaint.

By this Motion, Complainants demonstrate that the requested injunctive relief must be granted to prevent serious irreparable injury, not merely to Complaints and, in the case of ACC, CI and TFI, to their respective members, but to the entire TIH shipping network and the U.S. economy as a whole. Complainants will also demonstrate that the impact of the requested injunctive relief would be simply to maintain the status quo that has existed for decades, and the negative impacts on Defendants would be minimal, if any at all. Further, Complainants will demonstrate that they are very likely to prevail on the merits of this case. Defendants cannot demonstrate that the provisions of their SOP and related burdens and costs can be justified by any safety improvements over and above the prevailing and preempting federal regulations of the Department of Transportation, and may even cause security concerns by delaying and assembling TIH cars. As will be shown below and in the attached Verified Statement of Frank Reiner, the Motion for Injunctive Relief should be granted.

CRITERIA FOR INJUNCTIVE RELIEF

The Board has consistently applied a four part test relied upon in many United States District Courts and United States Circuit Courts in determining whether to grant

injunctive relief or to grant a stay pending Circuit Court Appeal. As noted in *Washington Metropolitan Area Transit Comm'n v. Holiday Tours,* 559 F.2d 841, 842 (D.C. Cir. 1977) that four part test is: (1) Has the petitioner made a strong showing that it is likely to prevail on the merits of its case? (2) Has the petitioner shown that without such relief, it will be irreparably injured? (3) Would the issuance of the injunctive relief substantially harm other parties interested in the proceedings? (4) Where lies the public interest? Applying these tests to this case clearly shows that injunctive relief should be granted.

1. Complaints are likely to prevail on the merits.

The Board's predecessor held that any railroad seeking to institute alleged safety or security measures on hazardous materials beyond those mandated by federal regulations governing such HazMat transportation must overcome a presumption that such additional measures are wasteful and unnecessary. *Consolidated Rail Corp. v. I.C.C.* 646 F.2d 642, 656 (D.C. Cir. 1981), affirming *Trainload Rates on Radioactive Materials, Eastern Railroads,* 362 I.C.C. 756 (1980).

In *Trainload Rates, supra,* the Eastern Railroads sought to impose Special Train Service ("STS") for the movement of spent nuclear fuel and impose charges for those services much higher than normal transportation rates. The I.C.C. found that STS and the resulting charges were not warranted by the alleged safety and security improvements that the Eastern Railroads said would result from STS. The I.C.C. referenced the regulations of the United States Department of Transportation ("DOT") and the Nuclear Regulatory Commission, but did not rely on those regulations as the primary basis for its determination as to the reasonableness of the STS.

On appeal, the D.C. Circuit affirmed the I.C.C. recognizing its discretion in determining the reasonableness of the STS and associated costs and burdens. At the same time, the Circuit went beyond the Commission's reasoning holding that:

> Where DOT and NRC, pursuant to specific statutory authority, have established "complete and comprehensive" safety standards in this particular area...and have drafted regulations in accord with "the best-known practicable means for securing safety" while balancing the cost of safety with the need for economy, a presumption arises that expenditures for safety measures not specified by these agencies are unnecessary and fail to satisfy the criteria of reasonableness outlined above, *supra* at p. 648[1], especially when such expenditures inflate shipping costs many times over. The ICC therefore properly defers to the expertise and primary jurisdiction [footnote omitted] of the NRC and DOT both in determining which particular measures are reasonably required to produce the necessary level of safety, and in deciding whether any particular safety measure will likely produce benefits commensurate with its costs and will be economical. [Citations omitted] 646 F.2d 650.

The rules and regulations issued with respect to the rail movement of TIH commodities are well known and have been well known for decades, and have been adjusted as necessary. Both the DOT, and more recently the Department of Homeland Security ("DHS") have issued complete and comprehensive safety and security standards governing all aspects of the rail transportation of TIH materials. Neither DOT nor DHS has issued regulations seeking to impose anything like the SOP mandated by RailAmerica and its railroad operating subsidiaries, including AGR. Again, as the Court noted in *Consolidated Rail Corp. v. I.C.C., supra,* at 656:

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[1] At page 648 the Court noted the criteria for reasonableness: "The safety measures for which expenditures are made must be reasonable ones, which means first, that they produce an expected safety benefit commensurate to their cost; and second that when compared with other possible safety measures, they represent an economical means of achieving the expected safety benefit."

> In judging the reasonableness of the tariffs in this case, the ICC was entitled to assume that heavy additional expenditures by the railroads allegedly for "safety" but mandated neither by DOT or (sic) NRC, were presumptively unnecessary and hence unreasonable. Since the railroads failed to rebut that presumption, we believe the Commission acted properly in finding on this record that STS was unnecessary as a safety measure, and that the tariffs based on it were therefore unreasonable.

The I.C.C. decision in the *Eastern Railroads* case, *supra,* and the affirmance of that decision in the *Consolidated Rail* case, *supra,* could hardly be more on point with this matter. Here, as there, the railroads at issue seek to impose their own view of what constitutes reasonable safety and/or security measures in direct contravention of the controlling complete and comprehensive regulations issued by the two federal agencies charged by Congress with issuing such regulations. And here, as there, unless and until the railroads at issue can demonstrate some extraordinary justification for these presumptively unnecessary and unreasonable measures, the Board will be obligated to find them unlawful. Given that RailAmerica will be very unlikely to demonstrate any such extraordinary justification, Complainants are likely to prevail on the merits of this action.

2. Absent injunctive relief Complainants and others will be irreparably injured.

The impact of the RailAmerica SOP when applied by its 40 short-line and regional carriers on TIH rail shipments can hardly be overstated. While the injury to the individual shippers and receivers of TIH materials resulting from the wasteful and unnecessary SOP procedures of RailAmerica with the resulting heavy additional costs would be substantial, it is much less dramatic than the injuries resulting from disruptions in normal shipping and manufacturing patterns and processes. As described in the

Affidavit of Frank Reiner, President of the Chlorine Institute, the SOP five day permit application process would result in serious logistics disruptions. For inbound cars the date of arrival at a short-line is out of the control of the shipper. There is considerable uncertainty as to when Class I railroads might deliver a TIH car or cars for the final leg of rail transportation. Similarly, moving cars in small groups at 10 mph on a special train basis will require additional cars in service. Such additional delays in transit and delivery would inevitably lead to car shortages and, since chorine storage at production facilities is limited, a shortage of cars could even lead to production shut-downs.

These are not fanciful concerns. Resources in the chlorine industry, as in any manufacturing industry, are scarce and must be applied on an as needed basis. The car supply resources have been determined with a normal, albeit somewhat irregular, cycle time in mind. The dramatic increases in cycle times that necessarily would result from the proposed RailAmerica SOP would seriously upset that car supply metric.

In addition, the security implications of storing TIH cars while marshalling them for special train service and the exceedingly slow movement of those cars over relatively long distances gives rise to serious security concerns. The security of the RailAmerica rail yards is uncertain and the slow movement over unsecured routes is not consistent with TSA goals of making TIH shipments inconspicuous.

In its comments to the Board in Ex Parte 705, *Competition in the Railroad Industry* (filed April 11, 2011), Olin Corporation refers to its very substantial movement of chlorine north from its McIntosh Alabama plant location. These chlorine shipments are made on a daily basis and constitute the largest single movement of chlorine in the

country. As is clear from the Olin comments,[2] the movement in question travels over tracks owned by the Norfolk Southern Railway Company ("NS"). Defendant AGR has trackage rights over these same NS tracks, and the AGR tariff involved in this proceeding applies to chlorine movements over those tracks. The prospect of the AGR moving three car trains at 10 mph over the mainline tracks of NS which, according to the Olin comments in Ex Parte 705, handle in excess of 2,700 cars of chlorine per year is nightmarish.

When one recalls that the AGR movement noted above is only one of many TIH movements handled by the 40 RailAmerica operating subsidiaries throughout the nation, the irreparable injury to the entire rail transportation network becomes quite obvious. The Board should enjoin the RailAmerica SOP and its resulting tariffs by RailAmerica subsidiaries to maintain the long-standing status quo during the pendancy of this litigation.

3. The requested injunctive relief would not injure other parties to this proceeding.

As noted above, the injunctive relief here requested would do nothing but maintain the status quo that has existed for decades with respect to the rail transportation of TIH commodities. At the same time, as set forth in the Verified Statement of Frank Reiner attached hereto, RailAmerica has been planning the implementation of the SOP and related tariff actions since at least June of 2010. It cannot be said that the issuance of injunctive relief would cause RailAmerica any immediate injury while the failure to issue such relief would cause the irreparable injury to Complainants and other TIH shippers and receivers noted above. The wholly speculative and yet to be established alleged

[2] See Olin comments Ex Parte 705, Exhibit A

safety improvements resulting from the RailAmerica SOP cannot begin to counterbalance the plain and immediate injury that would be suffered by Complaints and the shipping public should the SOP go into effect.

4. The public interest requires that injunctive relief be granted.

Defendants will surely claim that the public interest requires that their newly imposed "safety improvements" be allowed to go into effect. This contention, however, merely begs the question as to whether the SOP is indeed any safety improvement at all, and whether RailAmerica, or any individual railroad should be allowed to preempt and supersede the application of the complete and comprehensive federal regulations that have long governed the rail transportation of TIH commodities.

As noted above, the RailAmerica SOP stands to throw the normal and long-established shipping and receiving patterns of TIH commodities into a state of disruption. This disruption would occur without any indication whatever that the RailAmerica SOP program is the result of any study or even an internal investigation as to whether the SOP would have any positive results to counter the delays that surely would result from its implementation. As noted in the accompanying Verified Statement of Frank Reiner, RailAmerica never identified any quantitative or qualitative data to support the SOP. Nor did RailAmerica indicate that such data would be developed prior to the implementation of the SOP.

CONCLUSION

In view of the foregoing, the Board should issuance injunctive relief to maintain the status quo during the pendancy of this proceeding.

Respectfully submitted,

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April 19, 2011

BEFORE THE
SURFACE TRANSPORTATION BOARD

American Chemistry Council, The Chlorine Institute, Inc., The Fertilizer Institute, and PPG Industries, Inc. Complainants, v. Alabama Gulf Coast Railway, and RailAmerica, Inc. Defendants.	)	Docket No. NOR-42129

VERIFIED STATEMENT OF FRANK REINER

My name is Frank Reiner and I am President of the Chlorine Institute, Inc. ("the Institute"). I am submitting this Verified Statement in support of the Motion for Injunctive Relief filed by Complainants in the above-captioned proceeding.

I have worked closely with rail shippers since 1989. From 1989 to 2005 I held engineering and operations positions with two tank car leasing and manufacturing companies. Since 2005, I have been employed by the Institute. I joined the Institute as Vice President, Transportation and since 2010 have been President. Approximately 25% of North American chlorine production is shipped by rail. The Institute therefore has a strong, long-standing interest in maintaining the ability to ship this product safely by rail. I have been fully engaged in activities to further this objective during my tenure at the Institute.

In June of 2010, a representative of RailAmerica met with Institute staff, including me and Robyn Heald, and a staff member of the American Chemistry Council ("ACC"), Mr. Thomas Schick. At this meeting, RailAmerica indicated that it was anticipating imposing a set of operating procedures similar in all material respects to those set forth in the Complaint in this proceeding. RailAmerica sought a meeting with Institute members and members of the ACC to agree upon the terms and conditions under which such an operating plan could be imposed on a nationwide basis. While RailAmerica outlined the fundamental operating plans that it has now adopted, it did not indicate that it had conducted any study of any kind to support the safety allegations that it made. In fact, there was nothing behind the plan other than the assumptions of RailAmerica management.

It is my understanding that RailAmerica also made a similar request to The Fertilizer Institute ("TFI"). It is also my understanding that TFI responded in writing to this request indicating that antitrust considerations would not permit TFI members to agree with one another as to what they would be willing to pay for TIH transportation or under what conditions they would receive such TIH transportation services. This was the same conclusion that Institute counsel arrived at. After the June 2010 meeting, the Institute heard nothing regarding the RailAmerica plan until the Alabama Gulf Coast Railway published the tariff that is described in the Complaint.

The Institute monitors the supply of the privately owned railcars used to transport chlorine and I can say that the 6200 such cars are highly utilized. Uncertain rail cycle times put a strain on the car supply, as does unloading time and numerous other factors. Car management is a critical element of logistics management in the chlorine industry.

It must also be remembered that large scale chlorine storage at plant locations is generally not recommended for safety and security reasons. Thus, as chlorine is manufactured it is put directly into waiting chlorine cars. If such cars are not available, the plant itself, which runs on a 24-hour, seven-day-a-week basis, may have to shut down, which is a difficult and very costly process.

I have examined the Standard Operating Practices ("SOP") issued by RailAmerica and in my opinion it would be a highly disruptive and potentially dangerous course of conduct. Moving cars in small groups of one to three cars and at 10 miles per hour on a special train basis would tie up a substantial number of additional railcars. Further, I am concerned about how the special train service, with its five-day permit requirements, would impact compliance with the intent of both the Federal Railroad Administration and the Transportation Security Administration regulations. Marshalling TIH cars or holding such cars for a special train is not consistent with the intent of the rules in place. Such marshalling activities also call into question the security of the rail yards used to store these cars while special trains are being arranged for and necessary workers are being assembled.

In summary it is clear to me that this SOP and the tariffs resulting from it does nothing to enhance safety or security and in fact may reduce security. In our June 2010 meeting, RailAmerica did not offer any justification for its SOP other than its unsupported assumptions. It is my firm belief that contrary to the allegations of RailAmerica, then and now, this SOP will do nothing to improve safety and security and would have serious adverse impact on the entire TIH transportation network.

VERIFICATION

I, Frank Reiner, declare under penalty of perjury, that the foregoing statement is true and correct and that I am qualified and authorized to file this statement.

Executed: April 18, 2011

Frank Reiner

Frank Reiner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 19th day of April 2011 the foregoing Motion for Injunctive Relief together with the attached Verified Statement of Frank Reiner has been served by express overnight courier to:

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Paul M. Donovan